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Datasheet for the decision of 23 June 2023

Case Number: T 0068/21 - 3.3.09

Application Number: 16156441.4

Publication Number: 3061744

IPC: C07C227/40, C07C229/16, C11D3/33, C07C227/42, C11D7/32, C11D17/00

Language of the proceedings: EN

Title of invention:
PREPARATION OF FREE FLOWING GRANULES OF METHYLGLYCINE DIACETIC ACID

Patent Proprietor:
Unilever Global IP Limited
Unilever IP Holdings B.V.

Opponent:
BASF SE

Headword:
Preparation of free flowing granules of methylglycine diacetic acid/UNILEVER

Relevant legal provisions:
EPC Art. 100(c), 76(1)
RPBA 2020 Art. 12(4), 13(2)

Keyword:
Grounds for opposition - subject-matter extends beyond content of earlier application (yes)
Divisional application - subject-matter extends beyond content of earlier application (yes)
Late-filed objection - circumstances of appeal case justify admittance (yes)
Amendment to case - amendment admitted (yes)
Late-filed evidence - admitted (yes)

Decisions cited:
G 0007/93, G 0002/10, J 0014/19, T 0049/20, T 0075/11

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Case Number: T 0068/21 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 23 June 2023

Appellant: (Opponent)	BASF SE Carl-Bosch-Str. 38 67056 Ludwigshafen (DE)
Representative:	BASF IP Association BASF SE G-FLP-C006 67056 Ludwigshafen (DE)
Respondent: (Patent Proprietor 1)	Unilever Global IP Limited Port Sunlight Wirral, Merseyside CH62 4ZD (GB)
Respondent: (Patent Proprietor 2)	Unilever IP Holdings B.V. Weena 455 3013 AL Rotterdam (NL)
Representative:	van Benthum, Wilhelmus A. J. Unilever Patent Group Bronland 14 6708 WH Wageningen (NL)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 24 November 2020 rejecting the opposition filed against European patent No. 3061744 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	N. Obrovski
Members:	C. Meiners
	F. Rinaldi

Summary of Facts and Submissions

I. This decision concerns the appeal filed by the opponent (appellant) against the opposition division's decision to reject the opposition against the patent in suit (hereinafter "the patent").

II. In its notice of opposition, the opponent had requested that the patent be revoked in its entirety based on the grounds for opposition under Article 100(a) EPC in combination with Article 56 EPC (lack of inventive step), Article 100(b) EPC (lack of sufficiency of disclosure) and Article 100(c) EPC (added subject-matter).

III. In its decision, the opposition division found, *inter alia*, that the subject-matter of the claims as granted did not extend beyond the content of the parent/earlier application as filed (Article 100(c) EPC, cf. Article 76(1) EPC). Moreover, the opposition division admitted document D3 into the opposition proceedings.

IV. The following documents submitted by the parties are relevant to the decision:

D1 WO2009/103822 A1 (parent application as published of the opposed patent)

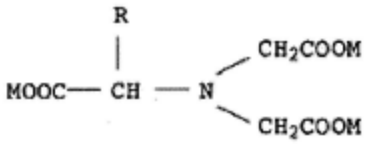
D3 Experimental report entitled "Preparation of Free Flowing Granules of Low Hygroscopicity of Methylglycine Diacetic Acid (MGDA) Salts at High Air Inlet Temperatures", as submitted by the patent proprietors on 9 April 2020

D4 Technical brochure of BASF entitled "Trilon® M types", May 2007

V. With their reply to the statement of grounds of appeal, the patent proprietors (respondents) filed auxiliary requests 1 to 3.

VI. Wording of the relevant claims

Claim 1 of the main request (claims as granted) reads as follows:
"A process for the preparation of free flowing granules of low hygroscopicity of one or more methylglycine diacetic acid (MGDA) salts, of the formula



wherein

R = CH3 and M is hydrogen, alkali metal, alkaline earth metal, ammonium or substituted ammonium in the appropriate stoechiometric amounts, and wherein the granules are of low hygroscopicity if, on open storage under normal ambient conditions, e.g. 20°C and a relative humidity of 65%, the granules retain their consistency as flowable granules over a period of at least one week, the process comprising the steps of

i) heating a concentrated slurry comprising methylglycine diacetic acid (MGDA) and/or any salts thereof, the slurry having a solids content in the range of 45% to 70%, and a moisture content of 30% up to 55%, to a temperature in the range of 50 to 120°C, and
ii) spray granulating said slurry."

Claim 1 of auxiliary requests 1 and 3 differs from claim 1 of the main request by the additional limitation "[,] using an air inlet temperature below the melting temperature of the methylglycine diacetic acid (MGDA) and/or any salts thereof."

Claim 1 of auxiliary request 2 is identical to claim 1 of the main request.

VII. The appellant's arguments, where relevant to the decision, can be summarised as follows:

(a) Contrary to the conclusion of the opposition division, the subject-matter of claim 1 as granted extended beyond the content of the earlier application as filed. In particular, claim 1 of the earlier application required an air inlet temperature of 120°C or less. This was reflected in the specification of the earlier application on page 5, line 18, and on page 9, lines 19 ff. The third sentence in the latter passage, teaching that "[t]he maximum air temperature should be chosen [to] be below the melting temperature of the material", had to be interpreted as a further requirement to be met rather than as a kind of "heading" of that passage. The skilled person would infer that this requirement had to be met in case further ingredients were present in the slurries to be spray-granulated. Consequently, there was no basis in the earlier application for the omission of a maximum gas inlet temperature of 120°C and of the nature of the gas used in the spray granulation.

(b) Likewise, the subject-matter of claim 1 of auxiliary requests 1 to 3 extended beyond the content of the earlier application as filed.

(c) Document D3 did not contain relevant information since the air inlet temperature was only 125°C in the experiments described therein. It was thus not suitable for corroborating that a maximum air inlet temperature of 120°C was not an essential feature (deleted from claim 1). Consequently, document D3 should not be admitted into the proceedings.

(d) Likewise, paragraph [22] of the proprietors' submission dated 11 May 2023 seemed to be a new line of argument that had not been submitted before. Thus, it constituted an amendment to the proprietors' appeal case and therefore, in accordance with Article 13(2) RPBA 2020, it should not be admitted.

VIII. The respondents' arguments, where relevant to the decision, can be summarised as follows:

(a) The subject-matter of claim 1 as granted did not extend beyond the disclosure of the earlier application as filed. It was directly and unambiguously derivable from the earlier application that the feature "using an air inlet temperature of 120°C or less" in claim 1 of the earlier application was not essential for carrying out the invention and was only disclosed as an optional limitation. It was mentioned on page 9, lines 24 to 25, of the earlier application that the temperature should be kept below the melting temperature of the MGDA or its salt which, according to D4, was higher than 300°C. Hence, an

air inlet temperature exceeding 120°C was acceptable. The aforementioned passage related only to the MGDA (salts) and did not extend to further ingredients. In view of this, it made no sense to assume that the teaching of the earlier application was to stay below 120°C. Likewise, it followed from D3 that an air inlet temperature of 120°C was not essential.

Hence, the resulting amendment to claim 1 as granted, namely the omission of the feature "using an air inlet temperature of 120°C or less", passed the "essentiality test" and was also in line with the "gold standard" as formulated in G 2/10. When applying the latter, the generic disclosure in the earlier application was that a maximum air inlet temperature below the melting point of the MGDA should be chosen. The non-preferred embodiments encompassed by the earlier application included working at an air inlet temperature above 120°C. These embodiments were at least implicitly disclosed as complements to the preferred and exemplified embodiments. Moreover, it followed from page 9, lines 2 to 6, and page 10, lines 11 to 14, of the earlier application that the gas stream used was not restricted to air.

The feature combination of claim 1 as granted was thus directly and unambiguously disclosed in the earlier application.

As to the subject-matter of claim 1 of auxiliary requests 1 and 3, the skilled person would understand that the term "material", disclosed in line 25 on page 9 of the earlier application, referred to the MGDA, which was mentioned in the

preceding text of that paragraph. Hence, the subject-matter of claim 1 of auxiliary requests 1 to 3 did not extend beyond the content of the earlier application either.

(b) Document D4 provided technical facts about MGDA and thus should be admitted into the proceedings.

(c) The appellant's objection relating to the omission of the use of air in the spray granulation step (as called for in claim 1) should not be admitted into the proceedings.

IX. Final requests

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondents requested that the appeal be dismissed and that the patent be maintained as granted or, as an auxiliary measure, that the case be remitted to the opposition division with the order to maintain the patent on the basis of one of auxiliary requests 1 to 3 as filed with the reply to the statement of grounds of appeal.

Reasons for the Decision

1. Admittance of documents and arguments

1.1 Document D3

1.1.1 At the oral proceedings before the board, the appellant did not provide further arguments in respect of the admittance of document D3. The board thus essentially

maintains its preliminary opinion on this issue, as set out in section 4 of its communication pursuant to Article 15(1) RPBA 2020.

1.1.2 Document D3 was filed by the respondents in response to the preliminary opinion of the opposition division, according to which the claimed subject-matter was insufficiently disclosed. By performing the experiments described in D3, the respondents directly addressed the cited objections, and they filed D3 prior to the deadline set under Rule 116 EPC. The opposition division admitted D3 and its decision is based, *inter alia*, on this document. Thus, D3 does not constitute an amendment within the meaning of Article 12(2) and (4) RPBA 2020. Accordingly, this legal provision does not grant the board any discretionary power to disregard the document.

1.1.3 Moreover, it is established case law that a board of appeal should only overrule the way in which a department of first instance has exercised its discretion when deciding on a particular case if it concludes that it has done so according to the wrong principles, or without taking into account the right principles, or in an unreasonable way, and has thus exceeded the proper limits of its discretion (Case Law of the Boards of Appeal, 10th edition, 2022, IV.C. 4.5.2; G 7/93, OJ 1994, 775). It is not the function of a board of appeal to review all the facts and circumstances of the case as if it were in the place of the department of first instance in order to decide whether or not it would have exercised its discretion in the same way (T 75/11). The board is of the opinion that the opposition division applied the correct criteria in a reasonable way and, having heard the parties on the matter, gave its reasons for its

decision. Hence, there is no reason for the board to reverse the decision.

1.1.4 Thus, D3 is part of the appeal proceedings.

1.2 Document D4

The filing of D4 constitutes an amendment within the meaning of Article 12(2) and (4) RPBA 2020 since the decision under appeal was not based on that document. Document D4 was filed by the respondents together with their reply to the statement of grounds of appeal as evidence that the melting temperature of MGDA (trisodium salt) is above 300°C. From this fact, the respondents infer that the earlier application as filed discloses a maximum air inlet temperature in the spray granulation step that can exceed 120°C (see paragraphs [19] to [21] of the reply to the statement of grounds of appeal). Whilst it could be argued that D4 could have been filed in the opposition proceedings, admitting that document did not increase the complexity of the case, was not detrimental to procedural economy and addressed objections raised by the opponent/ appellant under Article 100(c) EPC (cf. Article 76(1) EPC). Moreover, the appellant did not object to the admittance of that document.

It is for these reasons that the board admitted document D4 into the appeal proceedings (Article 12(4) RPBA 2020).

1.3 Objection in respect of the omission of the use of air in step ii) of claim 1

1.3.1 The respondents requested at the oral proceedings before the board that the appellant's objection

relating to the omission of the use of air in the spray granulation process in claim 1, which it had already relied on in its statement of grounds of appeal, not be admitted.

1.3.2 The board, however, notes that the corresponding objection that the omission of the feature "using an air inlet temperature of 120°C or less" in claim 1 as granted resulted in subject-matter that extended beyond the earlier application as filed had already been raised in the opposition proceedings. The point that this omitted feature contains two aspects, namely the use of air as a gas in the spray granulation step and a maximum gas inlet temperature of 120°C, constitutes a refinement of an existing argument or objection (see J 14/19, Reasons 1.8, last sentence), based on passages of the earlier application as filed already relied on in the opposition proceedings, rather than a new line of attack that would be based on new factual elements.

1.3.3 What is more, the board had already taken into account the refined line of argument against the omission in claim 1 in its preliminary opinion set out in its communication pursuant to Article 15(1) RPBA 2020. At that stage of the appeal proceedings, no request to disregard the opponent's refined line of argument had been on file.

1.3.4 Furthermore, the refinement is not complex and was also *prima facie* relevant to the decision to be taken by the board.

1.3.5 The refined line of argument has therefore been taken into account in the appeal proceedings.

1.4 Submissions presented in paragraph [22] of the respondents' letter dated 11 May 2023

1.4.1 The text in paragraph [22] of the respondents' submission dated 11 May 2023 contains new arguments to support their view that the earlier application as filed did not restrict the gas to be used in the spray granulation process to air and that no upper limit for the gas temperature was disclosed. This was shown on page 9, lines 2 to 6, of the earlier application as filed.

1.4.2 The appellant requested that the new arguments contained in paragraph [22] of the aforementioned submission not be admitted. The board observes that the respondents' arguments presented in paragraph [22] are counter-arguments to the refinement of the appellant's objection on added subject-matter concerning the omission of air in claim 1.

1.4.3 In view of the respondents' reference to new passages of the disclosure of the earlier application as filed and the interpretation thereof, the respondents' line of argument contained in paragraph [22] contains new factual elements (cf. J 14/19, Reasons 1.9). The new line of argument thus constitutes an amendment to the respondents' case within the meaning of Article 13(2) RPBA 2020 (and not a mere refinement thereof).

1.4.4 Nevertheless, taking into account the procedural context as set out in point 1.4.2 above, the fact that the respondents' line of argument in paragraph [22] had been presented well in advance of the scheduled oral proceedings and that it was not complex, the board has decided to admit the submissions made in paragraph [22]

of the respondents' letter dated 11 May 2023 into the proceedings (Article 13(2) RPBA 2020).

2. Added subject-matter (Article 100(c) EPC, cf. Article 76(1) EPC) - main request

2.1 Under Article 76(1) EPC, a divisional application may be filed only in respect of subject-matter which does not extend beyond the content of the earlier application as filed. It is established case law that the question of extension of subject-matter beyond the content of the earlier application as filed must be assessed using the "gold standard" as set out in G 2/10 (see T 49/20, Reasons 1.8). The "gold standard" is as follows: any amendment to the parts of a European patent application or European patent relating to the disclosure (the description, claims and drawings) is subject to the mandatory prohibition on extension of subject-matter and can therefore only be made within the limits of what a person skilled in the art would directly and unambiguously derive, using their common general knowledge, and seen objectively and relative to the date of filing, from the entirety of these documents as filed. After the amendment, the person skilled in the art may not be presented with new technical information (see Case Law of the Boards of Appeal, 10th edition, 2022, II.E.1.1). This standard also has to be applied when assessing whether the subject-matter of a divisional application (or the European patent based thereon) extends beyond the content of the earlier application as filed (see Case Law of the Boards of Appeal, 10th edition, 2022, II.F. 2.1.1).

2.2 The "gold standard" must also be applied when assessing the deletion of claim features. In such a case, there

must be a clear and unambiguous basis in the earlier application - under Article 76(1) EPC - for a claim lacking the deleted claim feature (see Case Law of the Boards of Appeal, 10th edition, 2022, II.E.1.4.2)

2.3 Claim 1 of the earlier application as filed included in step ii) the feature "using an air inlet temperature of 120°C or less". This feature was deleted in claim 1 of the divisional application leading to the patent in suit.

2.4 In the present case, the board agrees with the appellant's conclusion that the deletion of the expression "[,] using an air inlet temperature of 120°C or less" in claim 1 creates fresh subject-matter, lacking a basis in the earlier application as field. This deletion has two aspects:
- Firstly, the gas inlet temperature in the spray granulation process can be higher than 120°C.
- Secondly, the gas used in the spray granulation step ii) in claim 1 is not restricted to air (unlike in claim 1 of the earlier application) but instead can be any suitable gas (such as nitrogen).

2.5 First aspect (gas inlet temperature)

2.5.1 As to the first aspect, the respondents stated that the earlier application (see D1) disclosed the following on page 9, lines 19 to 21: "In the spray granulation process, it is *preferred* to spray granulate the MGDA containing slurry at an inlet air temperature of up to 120°C" (emphasis added by the respondents).

2.5.2 The next sentence in this passage of D1 also mentions methylglycine diacetic acid (MGDA): "When applying higher temperatures, even at 130°C, the MGDA becomes

sticky and such may result in serious problems during the processing, such as hot spots in the equipment."

2.5.3 The respondents argued that according to the first sentence quoted above, the upper limit for the air inlet temperature was merely "preferred" and thus not a strictly necessary feature. The second sentence quoted above could not be understood to mean that problems necessarily occurred when working at an air inlet temperature above 120°C. Even if that were the case, this would not necessarily mean that exceeding a temperature of 120°C would lead to the unavoidable end of the process and/or the deterioration of the properties of the final granulate obtained.

2.5.4 The board notes that the yardstick to be applied when assessing whether a claim amendment complies with the requirement of Article 76(1) EPC is the "gold standard" - and not whether the omitted claim feature is essential or, in the words of the respondents, "strictly necessary".

2.5.5 Having applied the gold standard, the board is of the opinion that there is no basis in the earlier application as filed for the generalised subject-matter created by the deletion of the claim feature "using an air inlet temperature of 120°C or less". In particular, the earlier application as filed discloses a clearly recognisable functional relationship between the feature "spray granulating said slurry", which remains in claim 1, and the feature "using an air inlet temperature of 120°C or less", which was deleted. This functional relationship follows from the teaching in the earlier application that "the MGDA" in the slurry "becomes sticky" when applying temperatures above 120°C, "which may result in serious problems during the

processing". The existence of this functional relationship does not depend on whether or not problems occur at each and every temperature value above 120°C.

It is also stated in the earlier application as filed that the MGDA becomes sticky "even at 130°C". This teaches, firstly, that this undesired occurrence already happens at temperatures close to 120°C ("even") and, secondly, that it also happens at other, higher temperatures.

2.5.6 Taking into account the additional experiments described in the post-published document D3 does not change the above conclusion that the deletion of the feature "using an air inlet temperature of 120°C or less" leads to added subject-matter in claim 1 compared with the disclosure of the earlier patent application. The board notes that no conclusions can be drawn from document D3 for inlet air temperature values exceeding 125°C. Moreover, the board concurs with the appellant that the experiments described in D3 do not form part of the disclosure of the patent.

It is for these reasons that the experiments described in D3 therefore cannot disprove the aforementioned functional relationship between the omitted expression and the part remaining in claim 1, i.e. "spray granulating said slurry".

2.5.7 The respondents countered that the statement "[t]he maximum air temperature should be chosen be [sic] below the melting temperature of the material ..." on page 9, lines 24 to 25, made it clear that the maximum air temperature could exceed 120°C; as disclosed in D4, the melting point of MGDA sodium salt was higher than 300°C.

2.5.8 Furthermore, it was common general knowledge that spray granulation could not be carried out above the melting point of the material. This requirement was thus implicit and did not have to appear in claim 1. Depending on the ingredients present in the spray-granulated material and the melting points thereof, the melting point of the material could decrease or increase.

2.5.9 It may well be that the melting point of the material could vary, depending on its ingredients. However, the conclusion that the maximum air temperature could be any temperature as long as it was below the melting temperature of the material (e.g. 300°C) has not convinced the board.

(a) Firstly, claim 1 does not contain this limitation, and the respondent's contention, presented at the oral proceedings before the board, that it was common general knowledge that spray granulation had inherently to be carried out below the melting temperature of the spray-granulated material was not corroborated.

(b) Secondly, in the view of the board, the aforementioned statement on page 9, lines 24 to 25, of the earlier application cannot be interpreted as a "heading" of the corresponding paragraph on page 9. Rather, it imposes an *additional* requirement, namely that in any case the maximum air temperature shall not exceed the melting temperature of the material (which can include, for example, polymers that may have lower melting points than that of the MGDA compound and even lower than 120°C). Hence, the melting points of additional components of the

granules formed, such as polymers, should not be exceeded either. Consequently, the board agrees with the appellant that this passage also applies to any further ingredients (optionally) being present in the granules. Whether such ingredients have been described in the preceding text or only in a subsequent passage on page 10 is irrelevant: when assessing the content of an earlier application, the entirety of its technical content is to be taken into consideration (see Case Law of the Boards of Appeal, 10th edition, 2022, II.F. 2.1.1, third paragraph).

In any case, the sentence in question does not suggest that an upper ceiling temperature of 120°C for the inlet air is merely optional, let alone that this feature can be deleted from claim 1 of the earlier application. As observed above, the *MGDA* becomes *sticky* even at 130°C. This does not support the respondents' contention that even 300°C, for example, a temperature still below the melting point of the MGDA trisodium salt and thus below the melting temperature of the "material" when spray granulating pure MGDA, would be a suitable inlet gas temperature for spray granulating the "material" to which lines 24 to 25 on page 9 refer. On the contrary, these considerations rather seem to support the appellant's view that this passage imposes a *further* limitation to be met.

(c) Thirdly, in the examples of the patent, maximum air inlet temperatures considerably lower than 120°C are used. The skilled person studying the earlier application would thus consider that this feature plays an important role.

(d) It is for these reasons, in particular in view of the observation made in points (a) and (b), that the board does not agree with the respondents' conclusion that the earlier application disclosed both preferred embodiments, involving maximum air inlet temperatures of 120°C, and non-preferred embodiments, involving air inlet temperatures exceeding 120°C, as complements to the exemplified and preferred embodiments. The argument that the subject-matter of the claims as granted ("the current claims") is at least implicitly disclosed in the earlier application must fail as well.

(e) It follows that the omission of the maximum gas inlet temperature of 120°C alone, which results in a spray granulating process without any upper gas inlet temperature in claim 1, gives rise to subject-matter extending beyond the content of the earlier application as filed.

2.6 Second aspect (use of air in the spray granulation)

2.6.1 As regards the second aspect referred to in point 2.4 above, the board notes that claim 1 does not mention the use of air in the spray granulation process. By contrast, and as correctly observed by the appellant, claim 1 of the earlier application stipulates the use of air in this process.

2.6.2 The respondents countered that it was common general knowledge that the use of air inherently formed part of the spray granulation process and was not essential, as followed from page 3, lines 24 to 25, of D1. Whilst air was the most applicable gas, there was no pointer in the earlier application that only air could be applied.

Air was mentioned in the earlier application as it was the cheapest gas that could be used. Nevertheless, the skilled person would be aware that nitrogen, for example, could equally be employed. On page 9, lines 2 to 6, of D1, reference was made to a "warm gas stream", and lines 11 to 14 on page 10 mentioned a "fluidizing gas stream". It followed from this that the gas temperature was not critical either as there was no upper limit for the gas temperature disclosed in these passages. As was clear to the skilled person, the terms "gas" and "air" could be used interchangeably. That was the reason why air had been mentioned in the earlier application.

2.6.3 At the oral proceedings, the board referred to the next sentence on page 10, lines 14 to 15, immediately following the reference to the "fluidizing gas stream", wherein reference is again made to "the air stream". There is thus in the board's view no reason to assume that the use of air in the spray granulation step is merely facultative in the earlier application in view of the cited passages on pages 3, 9 and 10. Claim 1 as granted does not exclude the (exclusive) use of nitrogen, for example, as a gas in spray granulation step ii). Thus, the use of air is not an inherent feature of step ii) of claim 1 as granted either.

2.7 The board has concluded that the omission of the two aspects referred to in point 2.4 above gives rise to a feature combination that is neither explicitly nor implicitly directly and unambiguously derivable from the earlier application. Consequently, the subject-matter of claim 1 as granted extends beyond the content of the earlier application as filed.

3. Amendments (Article 76(1) EPC) - auxiliary requests 1 to 3

3.1 The remarks made in point 2 above in respect of the main request also apply to the subject-matter of claim 1 of auxiliary requests 1 to 3. Claim 1 of auxiliary request 2 is identical to claim 1 of the main request and the amendment inserted into claim 1 of auxiliary requests 1 and 3, i.e. "[,] using an air inlet temperature below the melting temperature of the methylglycine diacetic acid (MGDA) and/or any salts thereof", cannot overcome the objection that the omission of a maximum air inlet temperature of 120°C in claim 1 gives rise to added subject-matter, extending beyond the content of the earlier application.

3.2 What is more, the board takes the view that the passage on page 9, lines 24 to 25, of the earlier application cannot serve as a basis for the additional amendment made in claim 1 of auxiliary requests 1 and 3. In fact, the maximum air inlet temperature should be below the melting point of the *material* (which can include any further ingredients, such as polymers) and not below that of the MGDA or of its salt(s). The counter-argument of the respondents that the text preceding page 9, lines 24 to 25, did not mention any further optional ingredients (referred to on page 10, lines 26 to 27) have not convinced the board. As outlined above, the slurry can contain further ingredients (which was not disputed by the parties). In this context, the appellant remarked that the slurry, to which reference is made in line 20 on page 9, *contains* MGDA ("the MGDA containing slurry"). The mere fact that a specific reference to such optional, further ingredients is only made on the subsequent page of the earlier application cannot call into question the fact that it has to be

scrutinised whether the omission of the aforementioned feature in claim 1 has a basis in the earlier application, taking into account the *entirety of the content* of document D1 (*vide supra*). By contrast, the slurries spray granulated in claim 1 are clearly not limited to MGDA (salts) but can contain further ingredients. Hence, there is no basis in the earlier application for changing the expression "below the melting temperature of the material" to "below the melting temperature of the methylglycine diacetic acid (MGDA) and/or any salts thereof" in the context of the feature combination of claim 1 of auxiliary requests 1 and 3.

3.3 Hence, the subject-matter of claim 1 of auxiliary requests 1 and 3 extends beyond the content of the earlier application also for this reason and thus does not meet the requirement of Article 76(1) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chair:

H. Jenney N. Obrovski

Decision electronically authenticated